STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2005
v	No. 254100 Oakland Circuit Court
DARELL MICHAEL BARNES, Defendant-Appellant.	LC No. 2003-192082-FC

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial convictions of armed robbery, MCL 750.529, carjacking, MCL 750.529a, kidnapping, MCL 750.349, and third-degree fleeing and eluding, MCL 257.602a(3). Defendant was sentenced as an habitual offender, third offense, to concurrent terms of twenty to forty years' imprisonment for his armed robbery conviction, twenty to forty years' imprisonment for his kidnapping conviction and twenty to forty years' imprisonment for his carjacking conviction. He was sentenced to a concurrent term of five to ten years' imprisonment for the fleeing and eluding conviction. We affirm, but remand to allow for correction of improper registration as a sex offender.

I

Defendant's convictions arise from an incident in the early morning hours of August 22, 2003, in which defendant accosted two women who stopped their car on a street in Detroit to buy marijuana from defendant. During the transaction, defendant placed a gun to the head of the woman driver, demanded money and jewelry, and repeatedly threatened to kill both women. He ordered the women to remove their clothing. When defendant learned that the driver had keys to a Blockbuster Video store in Walled Lake, where she was a shift leader, and that there could be $600 or more at the store, he told her that he would let her live if she went to the video store and got the money for him. Defendant rode with the two women to the video store.

When they arrived at the video store, the Blockbuster employee went inside to retrieve the money, while defendant and the other woman remained in the car. Once inside the store, the employee called 911 on a speakerphone and reported the abduction. As police arrived, the employee ran to an office in the back of the store and locked the door. Defendant fled the scene in the manager's car with the other woman still inside. After a high-speed chase, defendant

crashed the car and was apprehended by the police. The police found a toy gun in the car, which was the gun defendant allegedly used in the robbery and kidnapping.

II

Defendant claims that he was denied the effective assistance of counsel because his trial counsel did not present a defense of insanity. We disagree.

To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must overcome a strong presumption that counsel's action constituted sound trial strategy. *Id*. at 302. Because defendant did not move for a *Ginther*[1] hearing, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The record indicates that counsel did not learn of defendant's alleged mental problems until after trial, at which time defense counsel filed a motion to refer defendant for forensic evaluation. The motion was based on defendant's statement to counsel that he had been hearing voices and that he wished to be sent to the forensic center. In response to the court's inquiry, defense counsel stated that he had no facts to support the motion other than defendant's statement. The trial court denied the motion. Although the Presentence Investigation Report contained further claims by defendant that he had mental problems, these statements were likewise merely self-reported after the trial was concluded. Defendant has not shown that his counsel erred in failing to investigate or raise an insanity defense on the basis of these limited facts.

III

Defendant argues that he was denied his right of due process by the trial court's failure to instruct the jury on a consent defense with respect to the kidnapping charge. We disagree.

We review de novo claims of instructional error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). The failure to timely request an instruction constitutes a forfeiture of the issue, but an intentional relinquishment of the right waives the issue and extinguishes the error. A defendant who waives an instructional issue cannot obtain appellate review. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003).

Consent, if not obtained by fraud, duress or threats, is a complete defense to kidnapping. *People v Thompson*, 117 Mich App 522, 528; 324 NW2d 22 (1982); *People v LaPorte*, 103 Mich App 444, 448-449; 303 NW2d 222 (1981). Consent must exist throughout the commission of

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

the entire transaction. *Id*. at 449. Where a defendant produces enough evidence to put an affirmative defense into controversy, the prosecution bears the burden of disproving the affirmative defense beyond a reasonable doubt. *Thompson, supra* at 528.

As plaintiff points out, the trial court gave the standard jury instruction, CJI 2d 19.3, with regard to kidnapping. The instruction requires a finding that the victim was confined "against her will." Defendant did not request an instruction on consent, and the defense stated that it was satisfied with the jury instructions. This issue is waived.

Additionally, defendant has failed to show any error in the instructions, and therefore we reject defendant's further assertion that counsel for ineffective for failing to request an instruction on consent. Defendant contends that he was entitled to a consent instruction on the basis of the testimony of a defense witness, who stated that she observed defendant and the women as they were stopped in front of her home. The witness testified that she recognized defendant and had seen the women in the neighborhood on prior occasions. She assumed it was a drug transaction. She watched them for five or ten minutes, and then the female passenger got out of the car and into the back seat. Defendant got into the car on the passenger's side, and they drove away. The witness did not see defendant have a gun.

On appeal, defendant argues that the witness' testimony established a viable consent defense, i.e., the women left with defendant willingly and the later actions were a joint enterprise. However, this testimony does not establish that any alleged consent existed throughout the commission of the entire transaction thereby warranting an instruction on consent. *LaPorte, supra* at 449; *People v White*, 53 Mich App 51, 55-56; 218 NW2d 403 (1974).

IV

Defendant claims that the trial court committed error requiring reversal in scoring offense variable (OV) one at fifteen points. We find no error.

This Court reviews issues concerning the proper scoring of sentencing guidelines variables for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision will not be reversed if any evidence exists to support it. *Id*. OV 1 assesses points for aggravated use of a weapon:

> A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon....15 points. [MCL 777.31(c).]

Defendant contends that his use of a toy gun does not constitute use of a "firearm" under the statute because a toy gun is not a firearm. Defendant bases this argument on the definition of a "firearm" in the penal code, MCL 750.222. However, as plaintiff argues, our courts have upheld a conviction of armed robbery involving the use of a toy or simulated gun or pistol. *People v Jolly*, 442 Mich 458, 468-471; 502 NW2d 177 (1993); *People v Taylor*, 245 Mich App 293, 297-303; 628 NW2d 55 (2001). Accordingly, we conclude that analogous reasoning supports the scoring of OV 1 at fifteen points given defendant's use of the cap gun in effecting the robbery in this case. Moreover, defendant has failed to show that the error, if any, was not harmless.

V

Defendant alleges the trial court erred in imposing sentences of twenty to forty years for the armed robbery, kidnapping and carjacking convictions, and five to ten years for the fleeing and eluding conviction. We find no error.

Defendant was sentenced as a third-habitual offender. His minimum sentences were within the recommended sentencing guidelines range and must therefore be affirmed. Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309-311; 684 NW2d 669 (2004); *People v Garza*, 469 Mich 431; 670 NW2d 662 (2003).

Defendant asserts that the trial court failed to articulate its reasons for the sentences imposed. However, the trial court imposed the sentence recommended by the probation department and explained that it found the recommended sentence appropriate:

> Well, you're lucky that you didn't kill the passenger or you're lucky that the police didn't shoot and kill you. But what you did here is inexcusable. This isn't something that happened on the spur of the moment. This took quite a bit of time. You showed no concern for the victims in this case. I think the recommendation is appropriate.
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> * * *
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> You know, you're a young guy, and it seems like a long time, but you can still do something and make something of yourself.

In any event, no articulation is required when the enhanced sentence falls within the guidelines range for the underlying offense. *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992).

Defendant also argues that the trial court failed to conduct an assessment of defendant's rehabilitative potential, and therefore the maximum sentence of forty years is excessive and constitutes cruel and unusual punishment. Because defendant's sentence was within the sentencing guidelines range, this argument is without merit. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004), lv granted in part on other grounds 472 Mich 881; 693 NW2d 823 (2005); *People v McLaughlin*, 258 Mich App 635, 670-671; 672 NW2d 860 (2003).

Defendant argues, pursuant to supplemental authority, *Blakely v Washington*, 542 US___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, ___ US ___; 125 S Ct 738; 160 L Ed 2d 621 (2005), that his sentence was unconstitutional because the jury verdict did not encompass all the findings made by the trial court in sentencing defendant. However, our Supreme Court explained in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), that *Blakely* is inapplicable to Michigan's guideline scoring system. That determination constitutes binding precedent on this Court. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004). We find no basis for a different determination under *Booker*.

VI

Defendant claims that his required registration under the Sex Offender Registration Act (SORA), MCL 28.722(e)(v), is contrary to law. We agree.

Defendant asserts that his registration was improperly based on his kidnapping conviction, MCL 750.349, pursuant to subdivision e(v) of the SORA. Because subdivision e(v) only requires registration for a conviction of kidnapping if a victim is less than eighteen years of age, defendant contends that he was not required to register. He requests that the registration be stricken.

Although plaintiff asserts that defendant's remedy rests with the Department of Corrections (DOC), and not this Court, plaintiff apparently concedes that registration was not required in this case. Plaintiff indicates that any necessary correction presumably will be made voluntarily by DOC. Under the circumstances, we remand to the trial court and direct that the court take appropriate action, if necessary, to ensure that entry of the improper registration is corrected.

Affirmed, but remanded for the limited purpose of remedying the improper registration under the SORA. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood